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CONGRESSIONAL PROHIBITIONS OF INTERSTATE COMMERCE.

Each succeeding session of Congress witnesses an increasing number of proposals to subject to federal regulation matters which in this country have heretofore been dealt with exclusively by the States. The proponents of these measures are evidently prompted to turn to the federal government for the accomplishment of their purpose by a desire for uniformity of regulation throughout the country and despair of attaining that uniformity by the coöperation of the States, or by greater faith in the efficiency of federal administration. Impotency or inefficiency of state regulation or the confusion and injustice resulting from conflicting state authority cannot add to the powers delegated to Congress by the federal constitution but they constitute pursuasive arguments in favor of resorting to any delegated power which can be made to accomplish directly or indirectly the purpose sought.

By far the greater number of the pending proposals for extending federal control depend for their constitutionality on the commerce clause and the taxing power. Legislators have been quick to see the possibilities of recent Supreme Court decisions permitting the use of these great powers to rival or to supplement the police power of the States. An Act of Congress levying a prohibitory tax on yellow oleomargarine—obviously not intended to produce revenue but to destroy the article taxed—having been upheld by the Supreme Court,[1] Congress levied similar prohibitive taxes on poisonous phosphorous matches[2] and on certain contracts for the

[1]Act of August 2, 1886, 24 Stat. 209. McCray *v.* United States (1904) 195 U. S. 27, 24 Sup. Ct. 769.

[2]Act of April 9, 1912, 37 Stat. 81.

future sale of cotton.[3] Congress has also levied a nominal tax on opium dealers and, under the pretence of providing for its collection, regulated the business of buying and selling opium.[4] By such tax laws Congress is enabled indirectly to regulate matters which it could not constitutionally regulate directly.

In like manner Congress, though without power to prohibit the conduct of lotteries in a State, indirectly but effectively destroyed the lottery business by forbidding the shipment in interstate commerce of lottery tickets or literature. The lottery act having been upheld by the Supreme Court,[5] Congress has since enacted other laws, some of which have likewise been held constitutional, prohibiting interstate commerce in specified persons or things, not in the interest of commerce itself, but in the interest of the public welfare.

When the Supreme Court established the right of Congress to use the taxing power for regulation as well as for revenue, and the commerce power as well for promoting the public welfare as for the protection and advancement of interstate commerce, it opened the gateways to indefinite expansion of federal regulation. What may Congress not do under the power to tax out of existence, to regulate under the guise of taxation, or to withdraw the facilities of interstate commerce from specified persons or things?

The indirect use of the commerce power is the more important and interesting because it is most often resorted to and because it involves more unsettled questions. The Supreme Court might have ruled that regulation of interstate commerce could not take the form of prohibition of such commerce. It might have ruled that Congress could regulate or prohibit interstate commerce only in the interest of protecting or benefiting that commerce or its instrumentalities and not for the purpose of protecting the public health, safety, morals or welfare. But the Supreme Court has not so limited the power; on the contrary it has upheld congressional prohibitions of interstate commerce enacted for the protection of public morals or for the advancement of the public welfare. Opponents of federal regulation have been obliged, therefore, to find some other bar to the further extension of the federal power through indirect use of the commerce clause. They urge that Congress cannot regulate manufacturing, that Congress cannot trespass on the reserved powers of the States and that Congress,

[3]Act of August 18, 1914, 38 Stat. 693.
[4]Act of December 17, 1914, 38 Stat. 785.
[5]Lottery Case (1903) 188 U. S. 321, 23 Sup. Ct. 321.

though it may look forward and protect the consumer of articles transported through interstate commerce, may not look backward and protect the producer of articles to be transported in interstate commerce. These attempts to limit the field of regulation opened to Congress under the commerce clause by the decision in the lottery and white slave cases,[6] raise fundamental questions as to the nature and extent of the Congressional power over commerce.

In considering what limitations, if any, the federal constitution places on the power of Congress over interstate commerce, we shall avoid confusion if we keep constantly in mind the difference between the question whether in a given instance Congress is acting under the power delegated to it under the commerce clause, and that related but separate question whether, admitting that Congress is acting within its powers, its action may be objected to by the individual on the ground that it deprives him of that due process guaranteed to him by the Fifth Amendment. These are distinct questions. The one involves the respective jurisdictions of the federal and state governments to be determined under the commerce clause and the reserve powers clause. The other has nothing to do with the relation of the nation and the States but arises only after we have determined that a regulation is clearly within the federal power, and it involves only the right of the individual under the Fifth Amendment to resist federal action which operates to deprive him of life, liberty or property without due process.

That the power to "regulate" interstate commerce includes power to "prohibit" such commerce may be demonstrated by general principles of interpretation and by precedent. Under the Articles of Confederation each State had complete control of its commerce with other States and could of course prohibit such commerce. The exercise of this power resulted in embarrassing and destructive consequences and led to an oppressed and degraded state of commerce.[7] The prevailing motive for the adoption of the present Constitution, said Daniel Webster in his argument in the case of *Gibbons* v. *Ogden*,[8] was "to rescue it [commerce] from the * * * perpetual jarring and hostility of commercial regulation. * * * The entire purpose for which the delegates assembled at Annapolis, was to devise means for the uniform regulation of trade. They found no means, but in a general government; and they recommended a convention to accomplish

[6] Hoke *v.* United States (1913) 227 U. S. 308, 33 Sup. Ct. 281.
[7] Brown *v.* Maryland (1827) 12 Wheat. 419, 446.
[8] (1824) 9 Wheat. 1, 11, 12, 13.

that purpose. * * * We do not find, in the history of the formation and adoption of the Constitution, that any man speaks of a general *concurrent power,* in the regulation of foreign and domestic trade, as still residing in the States. The very object intended, more than any other, was to take away such power. If it had not so provided, the Constitution would not have been worth accepting."

The power of Congress over interstate commerce is exclusive; there is no residuum of power over this commerce remaining in the States.[9] In delegating to the federal government the exclusive power to regulate interstate commerce, the States unquestionably divested themselves of their previous power to prohibit such commerce. If the power to "prohibit" interstate commerce was not included in the grant to Congress of power to "regulate" such commerce, what has become of that power? It has been argued that when the individual States surrendered their power to prohibit commerce that power thereupon ceased to exist in either the federal or state governments. But this theory, which has nothing whatever to support it, is negatived by Section 9 of Article I of the Constitution which provides: "The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by Congress prior to the year 1808." Prohibition by Congress of the "migration" of such persons could be based only on the power to regulate interstate commerce; and if the framers of the Constitution did not intend the power to regulate to include power to prohibit, this express restriction on the power to prohibit such migration or commerce was entirely superfluous. It must be assumed that the framers of the Constitution believed that there was necessity for this provision; and that they so believed indicates that they intended the power to regulate interstate commerce granted in an

[9]This power "is complete in itself, may be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the constitution". Gibbons *v.* Ogden (1824) 9 Wheat. 1, 196; Lottery Case (1902) 188 U. S. 321, 353, 23 Sup. Ct. 321, 325-326. "The full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate or intrastate operations." Minnesota Rate Cases (1913) 230 U. S. 352, 399, 33 Sup. Ct. 729, 739. "The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary". Hoke *v.* United States (1913) 227 U. S. 308, 320, 33 Sup. Ct. 281, 283. "Is there, then, any escape from the conclusion that subject only to such restrictions (those contained in the constitution) the power of Congress over interstate and international commerce is as full and complete as is the power of any State over its domestic commerce?" Northern Securities Case (1904) 193 U. S. 197, 342, 24 Sup. Ct. 436, 459.

earlier section of the Constitution to include power to prohibit the migration of these persons.[10]

The Supreme Court has frequently declared that the power of Congress over interstate commerce is as extensive as its power over foreign commerce.[11] In *Bowman* v. *Chicago and Northwestern Ry.*[12] the court said: "The power conferred upon Congress to regulate commerce among the States is indeed contained in the same clause of the Constitution which confers upon it power to regulate commerce with foreign nations. The grant is conceived in the same terms and the two powers are undoubtedly of the same class and character and equally extensive." Again, in *Crutcher* v. *Kentucky*[13] the court said: "It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce."

The regulation of foreign commerce has frequently assumed the form of prohibition. Not only the early embargo and non-intercourse acts[14] but more recent prohibitions of foreign commerce in specified articles have been upheld by the Supreme Court. Among these are the prohibition of importation of inferior grades of tea,[15] of deep sea sponges taken by divers[16] and of foreign convict-made articles.[17] In *Weber* v. *Freed*[18] the court in upholding the prohibition of importation of prize fight films, said that Congress possesses a complete power over foreign commerce and that "its authority to prohibit the introduction of foreign articles" is "recognized and enforced by many decisions of this court". Therefore, if the power to regulate foreign commerce may be exercised to the extent of absolute prohibition, and if the power over interstate commerce is "equally extensive" and "as absolute as it

[10]The importance of this provision as proving the existence of the power to which it is an exception, was remarked by Chief Justice Marshall in Gibbons *v.* Ogden (1824) 9 Wheat. 1, 216.

[11]Gibbons *v.* Ogden (1824) 9 Wheat. 1, 194, 228; License Cases (1847) 5 How. 504, 578; Brown *v.* Houston (1885) 114 U. S. 622, 630, 5 Sup. Ct. 1091, 1097; Pittsburg & Southern Coal Co. *v.* Bates (1895) 156 U. S. 577, 587, 15 Sup. Ct. 415, 419; Lottery Case (1903) 188 U. S. 321, 351, 23 Sup. Ct. 321, 325.

[12](1888) 125 U. S. 465, 482, 8 Sup. Ct. 689.

[13](1891) 141 U. S. 47, 57, 11 Sup. Ct. 851, 854.

[14]Gibbons *v.* Ogden (1824) 9 Wheat. 1, 192; United States v. Marigold (1850) 9 How. 560, 566; United States *v.* Williams (1808) 18 Fed. Cas. 614.

[15]Buttfield *v.* Stranahan (1904) 192 U. S. 470, 24 Sup. Ct. 349.

[16]The Abby Dodge (1912) 223 U. S. 166, 32 Sup. Ct. 310.

[17]Oceanic Navigation Co. *v.* Stranahan (1909) 214 U. S. 320, 29 Sup. Ct. 671.

[18](1915) 239 U. S. 325, 36 Sup. Ct. 131.

is over foreign commerce" it must necessarily follow that it too may be exercised to the extent of prohibition. This is not to assert that in dealing with interstate commerce Congress possesses the same unrestricted and arbitrary power of prohibition which it may exercise over foreign commerce. The reason for the difference, however, is found not in the commerce clause but in the due process clause of the Fifth Amendment to the Constitution which restrains Congress from arbitrarily depriving the individual of his right to seek an interstate market, but which, because of the general power of Congress over foreign relations has not been applied to guarantee a similar right to seek a market in foreign commerce.

The conclusion that the power to regulate includes the power to prohibit interstate commerce does not, however, depend on general principles of interpretation. It is supported by a number of Supreme Court decisions sustaining prohibitions of transportation or shipment in interstate commerce of specified persons or things. The Supreme Court has upheld Congressional prohibitions of transportation of lottery tickets or advertising matter relating to lotteries,[19] of obscene literature and articles designed for immoral and indecent use,[20] of adulterated or misbranded food or drugs,[21] of transportation of women from one State to another for immoral purposes[22] and of transportation of commodities in which the carrier thereof has a legal interest.[23] It has also upheld the equivalent of prohibition of the transportation of intoxicating liquors in interstate commerce. The Wilson Act[24] declared that on arrival within a State intoxicating liquors shipped from another State become subject to the State's police regulations and are not to be re-

[19]Act of Congress of 1895, 28 Stat. 963, Ch. 191, held constitutional in Champion *v.* Ames (Lottery Case) (1903) 188 U. S. 321, 23 Sup. Ct. 321.

[20]Act of Congress of February 8, 1897, 29 Stat. 512, Ch. 172, and Act of March 4, 1909, 37 Stat. Sec. 249, held constitutional in United States *v.* Popper (D. C., N. D. Cal. 1899) 98 Fed. 423, and cited with approval in Hoke *v.* United States (1913) 227 U. S. 308, 33 Sup. Ct. 281.

[21]Act of June 30, 1906, 34 Stat. 768, Ch. 3915, interpreted and its penalties enforced by the Supreme Court in Hipolite Egg Co. *v.* United States (1911) 220 U. S. 45, 31 Sup. Ct. 364 and United States *v.* Lexington Mill & Elevator Co. (1914) 232 U. S. 399, 34 Sup. Ct. 337. In Seven Cases *v.* United States (1916) 239 U. S. 510, 36 Sup. Ct. 190, the Supreme Court held constitutional an amendment to this Act penalizing false statements as to the curative value or effects of an article.

[22]Act of Congress of June 25, 1910, 36 Stat. 825, Ch. 395, held constitutional in Hoke *v.* United States (1913) 227 U. S. 308, 33 Sup. Ct. 281.

[23]Act of Congress of June 29, 1906, 34 Stat. 584, Ch. 3591, held constitutional in United States *v.* Delaware & Hudson R. R. (1909) 213 U. S. 366, 29 Sup. Ct. 527.

[24]26 Stat. 313, Ch. 728, held constitutional in *In re* Rahrer (1891) 140 U. S. 545, 11 Sup. Ct. 865.

garded as exempt therefrom under the rules protecting original packages shipped in interstate commerce. The power of Congress thus to subject a legitimate article of commerce to state laws which practically prohibit its transportation into a State implies power in Congress to prohibit such transportation. In the Webb-Kenyon Act[25] Congress has prohibited the shipment into a State of intoxicating liquor intended to be used in such State contrary to its laws. This Act has not yet been declared constitutional by the Supreme Court, but that Court has interpreted and applied it without questioning its constitutionality.[26]

Another interesting example of the exercise by Congress of its power to prohibit interstate commerce is the so-called Lacey Act[27] which prohibits interstate shipment of animals or birds killed in violation of state game laws. Like the Webb-Kenyon Liquor Law the Lacey Act represents a use of Federal power to aid the States in enforcing their police regulations. It penalizes shipping out of the State while the Webb-Kenyon Act penalizes shipping into the State. This Act has been held constitutional in the federal and state courts.[28]

Other examples of prohibitions of interstate shipments are: The meat inspection Act[29] which prohibits the shipment of uninspected meat; the cattle quarantine Acts[30] which prohibit shipment of uncertified cattle; the nursery stock Act[31] which prohibits shipment of unmarked nursery stock; and the Act[32] which prohibits shipment of specified virus, serum and toxin for treatment of animals.

So far as the commerce clause is concerned it may, therefore, be regarded as established that a regulation of interstate commerce may take the form of an absolute prohibition of shipment or transportation in such commerce. If the precedents went no further than to uphold the probihition of interstate commerce their value as a

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[25]37 Stat. 699, Ch. 90.

[26]Adams Express Co. *v.* Kentucky (1914) 238 U. S. 190, 35 Sup. Ct. 824.

[27]Sec. 242 of the Criminal Code of the United States.

[28]Rupert *v.* United States (C. C. A. 8th, 1910) 181 Fed. 87; Eager *v.* Jonesboro etc. Express Co. (1912) 103 Ark. 288, 147 S. W. 60, 63. This Act was referred to by the Supreme Court in Silz *v.* Hesterberg (1908) 211 U. S. 31, 44, 29 Sup. Ct. 10, 14, and was construed in United States *v.* Smith (D. C., M. D. Pa. 1902) 115 Fed. 423 and United States *v.* Thompson (D. C., D. N. Dak. 1906) 147 Fed. 637.

[29]June 30, 1906, 34 Stat. 674.

[30]February 2, 1903, 32 Stat. 791; March 3, 1905, 33 Stat. 1264.

[31]August 20, 1912, 37 Stat. 315.

[32]March 4, 1913, 37 Stat. 828.

basis for extending federal control would be unimportant if it were also held that the power to regulate interstate commerce could be exercised only for the protection, advancement or development of such commerce. The importance of the commerce clause as a source of extended federal control lies in the decisions that this power of regulation may be exercised not only for the advancement and the good of interstate commerce, but also as an instrument for promoting the public health, morals, safety or welfare.

It has frequently been stated in the opinions of the Supreme Court that Congress possesses police power under the commerce clause. The discussion of this question, which unfortunately too often proves confusing rather than helpful, is unnecessary for the purpose of this paper. The important fact is that the commerce power may be used not only to protect, benefit or advance commerce itself or its instrumentalities but also to advance the general welfare by indirection through commercial regulation. In the early case of *United States* v. *Williams*[33] Judge Davis in sustaining the constitutionality of the then recent embargo act, said:[34]

"The power to regulate commerce is not to be confined to the adoption of measures exclusively beneficial to commerce itself or tending to its advancement; but in our national system as in all modern sovereignties it is also to be considered as an instrument for other purposes of general policy and interest".

That the power of Congress over interstate as well as foreign commerce may be used as "an instrument for the purposes of general policy" is evidenced by recent decisions of the Supreme Court. In holding constitutional a prohibition of interstate transportation of lottery tickets, the Court[35] said:

"If a State, when considering legislation for the suppression of lotteries within its own limits, may properly take into view the evils that inhere in the raising of money, in that mode, why may not Congress, invested with the power to regulate commerce among the several States, provide that such commerce shall not be polluted by the carrying of lottery tickets from one State to another. (p. 356) * * * We should hesitate long before adjudging that an evil of such appalling character, carried on through interstate commerce, cannot be met and crushed by the only power competent to that end. We say competent to that end, because Congress alone has the power to occupy, by legislation, the whole field of interstate commerce. (p. 357) * * * If the carrying of lottery tickets

[33](1808) 18 Fed. Cas. 614.

[34]At p. 621.

[35]In Champion *v.* Ames (1903) 188 U. S. 321, 23 Sup. Ct. 321.

from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offense to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce * * * which has grown into disrepute and has become offensive to the entire people of the nation." (p. 358)

Lottery tickets as articles of commerce were harmless in themselves and there was nothing immoral about their transportation from one State to another. The harm which they did consisted in the detriment to public morals arising from lottery gambling, and what Congress did by its prohibition of their transportation was to withdraw the instrumentalities of commerce over which it had control from the proprietors of lotteries who were seeking an interstate market. There is no denying the fact that the purpose of the prohibition was to stamp out lotteries, and the opinion shows clearly that the court recognized this purpose and upheld it. Congress had no power directly to prohibit lottery gambling, but under the power to regulate interstate commerce it was authorized to deny to the lottery business the privilege of using the facilities of interstate commerce. The importance of this decision can hardly be over-estimated. Until it is qualified or reversed it opens the door and points the way to extended federal regulation. Later cases disclose no tendency toward qualification or restriction of the principles announced in this case. On the contrary, those principles seem now to be firmly established.[36] The Supreme Court in upholding the constitutionality of the white slave traffic Act[37] said:

"The powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. * * * Surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women."

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[36]In McDermott *v.* Wisconsin (1912) 228 U. S. 115, 33 Sup. Ct. 431, the court said that Congress "has full power to keep the channels of commerce free from the transportation of illicit or harmful articles, to make such as are injurious to the public health outlaws of such commerce and to bar them from the facilities and privileges thereof."

[37]Hoke *v.* United States (1913) 227 U. S. 308, 322, 33 Sup. Ct. 281, 284.

These cases establish the constitutional power of Congress to prohibit interstate commerce in the interest of promoting the public health, safety, morals or welfare. Congress may forbid interstate commerce in specified persons or things in order to prevent the facilities of such commerce being used to maintain or to further conditions detrimental to the welfare of the country.[38]

What are the limitations, if any, on this power? It has been suggested that there is a distinction between those prohibitions of interstate commerce which operate to forbid transportation of articles or persons to the point where their harmful or objectionable effects are produced, and those prohibitions which exclude from commerce articles to which the only objection is the circumstances under which they were produced. It is alleged that while Congress may prohibit shipment in the interest of protecting the consumer at the end of a journey, it cannot prohibit commerce in the interest of protecting the producer prior to the commencement of a journey in interstate commerce. In the latter case it is said that the damage done by the goods, if any, has been completed before they are offered for carriage in interstate commerce and their transportation into another State cannot increase their damaging effects. The distinction is commonly referred to as the difference between protection of the consumer and protection of the producer. There is nothing in the opinions of the Supreme Court upon which to base such a distinction. Congress in enacting the Lacey Act, prohibited the interstate transportation of perfectly good articles of commerce in the interest of protecting not the consumers of such articles, but persons who have nothing whatever to do with such articles, namely, the hunters or general public of the State of origin. The court has upheld regulations of interstate commerce enacted solely for the protection of the public morals and welfare, and has thereby given effect to indirect regulation where direct regulation would be clearly unconstitutional. It is not the welfare of the consumer which justifies the regulation but the welfare of the public, and as will be pointed out in the discussion of the effect of the due process clause on the exercise of the commerce power, the public welfare is as much dependent upon the welfare of the producer as upon the welfare of the consumer.

Finally, in an effort to stay the tide of federal regulation, its opponents contend that those prohibitions of interstate commerce

[38]See also Seven Cases *v.* United States (1916) 239 U. S. 310, 36 Sup. Ct. 190, holding constitutional the Sherley Amendment to the Food and Drugs Act.

which have for their purpose the advancement of the public welfare rather than any benefit to commerce or its instrumentalities, cannot be carried to the point of interfering with the powers reserved to the States by Art. 10 of the Amendment to the federal constitution which provides: "Powers not delegated to the United States by the Constitution nor prohibited by it to the States are reserved to the States respectively or to the people." This provision, however, does not apply to a delegated power and only prevents an extension of the powers of Congress to a subject which is not fairly within the scope of those granted by the Constitution. Therefore, Art. 10 does not help to solve the question at issue, which is the extent of the power delegated to Congress under the commerce clause, and especially whether the indirect effects of a regulation of commerce shall be considered in determining the validity of that regulation. As a result of the decision in the Knight case,[39] where it was held that Congress could not directly regulate manufacturing on the ground that the products of the factory would enter into interstate commerce, there has grown up in the profession, and even more among laymen, the idea that Congress cannot interfere with manufacture or production. In the Knight case the court drew a line separating the process of manufacture or production from the process of sale and transportation and held that manufacturing was not commerce and could not, therefore, be regulated directly. The authority of the Knight case has been limited by the Addyston Pipe Line[40] and other recent decisions, and even under the most liberal construction it did not hold that Congress, in the exercise of its undoubted power to regulate interstate commerce, cannot affect the conditions under which manufacturing is carried on.

The Knight case must not be given the effect of a declaration in the federal constitution that Congress shall never affect the conditions under which manufacture is carried on in the States. Such a declaration would have qualified every express grant of power to the federal government and it would then have been true that no regulation of commerce could affect manufacture. This case simply emphasized the distinction between manufacture and commerce but it has led to some confusion and there has grown up not only in the lay mind but in the minds of many lawyers and judges the notion that whatever else it can do Congress can never

[39]United States *v.* E. C. Knight Co. (1895) 156 U. S. 1, 15 Sup. Ct. 249.

[40]Addyston Pipe & Steel Co. *v.* United States (1899) 175 U. S. 211, 20 Sup. Ct. 96.

affect manufacturing. The fact is Congress may reach and affect conditions of manufacture and other acts which take place prior to transportation, and has done so, in the course of its regulation of commerce.

The consequence of several laws passed under the commerce clause has been to affect indirectly the process of manufacture. The meat inspection Act forbids shipment of uninspected meats and authorizes inspectors to enter packing establishments. The constitutionality of this Act has never been questioned. Section 9 of the pure food and drugs Act relieves from prosecution a dealer who can establish a guarantee from the manufacturer that the article shipped was not adulterated or misbranded, and in that case makes the guarantor amenable to prosecution. The court has held this provision of the Act constitutional[41] thereby upholding the power of Congress to reach and affect indirectly conditions of manufacture and sale where the primary purpose is a regulation of interstate commerce.[42] In the Hoke case it is said:[43] "It may be that Congress could not prohibit the manufacture of the article in a State. It may be that Congress could not prohibit in all of its conditions its sale within a State; but Congress may prohibit its transportation between the States and by that means defeat the motive and evils of its manufacture."

In both the Lottery and the Hoke cases it was argued that Congress was invading the field of powers reserved to the States. The court in the latter case effectually disposed of this contention by declaring:[44] "The power of Congress under the commerce clause of the constitution is the ultimate determining question. If the statute be a valid exercise of that power how it may affect persons or States is not material to be considered. It is the supreme law of the land and persons and States are subject to it." To the same effect Mr. Justice Hughes in his recent address before the New

[41]In United States *v.* Heinle Specialty Co. (D. C., E. D. Pa. 1910) 175 Fed. 299 a manufacturer was prosecuted for violation of the Act and it appeared that the dealer to whom he sold adulterated food with a guarantee had shipped it in interstate commerce. The defendant contended that his connection with the food was limited to manufacture and sale within the State and that the law was unconstitutional in so far as it affected his wholly intrastate transactions.

[42]The proposed child labor bill which is typical of pending proposals for extension of federal regulation does not attempt directly to regulate either the manufacture within a State or intrastate sales but simply attempts to prevent the products of a factory employing children from being shipped in interstate commerce.

[43]227 U. S. at p. 322.

[44]At p. 320.

York State Bar Association said: "Thus it is recognized that within its sphere as defined by the Constitution the nation is supreme. The question is simply of the extent of the federal power as granted; where there is authorized exercise of that power there is no reserved power to nullify it—a principle obviously essential to the maintenance of national integrity, yet continually calling for new applications. Thus regulations required in the exercise of the judgment committed to Congress for the protection of interstate commerce cannot be made nugatory by the mere commingling of interstate and intrastate transactions." Not only the authority of the Knight case, but the emphasis which it placed on the idea that manufacturing was set apart and free from the possibility of federal regulation, has been gradually overcome. While Congress cannot directly affect conditions of manufacture or of sale just as it cannot directly regulate intrastate railroad rates, it may, nevertheless, in the exercise of its power over interstate commerce, incidentally affect manufacture and sale or intrastate rates.[45] President Goodnow says:[46] "Men's minds are peculiarly twisted when they argue under a Constitution containing such a provision (the commerce clause) that a regulation purporting to be a regulation of interstate commerce is not such because it will necessarily have the incidental effect of regulating conditions of manufacture. The only reason why it will have this incidental effect is because in the economic conditions of the present day manufacturing has ceased to be a state and has become an interstate matter."

The foregoing portion of this paper has been limited to a discussion of the extent of the power granted to Congress by the commerce clause. We have seen that the power to regulate includes the power to prohibit interstate commerce in specified articles or persons, that this power to regulate or to prohibit may be exercised not only to protect or advance interstate commerce or its instrumentalities, but also indirectly to promote the public health,

[45]In the Minnesota Rate Cases (1913, 230 U. S. 352, 398) it is said: "The authority of Congress extends to every part of interstate commerce and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the nation may deal with the internal concerns of the State as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter."

[46]Social Reform and the Constitution, p. 91.

safety, morals or welfare, and that though Congress cannot directly regulate such intrastate matters as manufacture and production, it may, without trespassing on the reserved powers of the States, regulate or prohibit interstate commerce in such manner as to affect incidentally conditions of manufacture or production. In all of this discussion, we have been searching for the line which separates the federal jurisdiction over commerce from the state jurisdiction. In the determination of this question, we are concerned only with the commerce clause and its interpretation. No other provision of the Constitution throws any substantial light on the problem. What is that commerce over which power was vested in the federal government and in what manner or for what purpose may this power be exercised? The result of the decisions is that the power is exclusive and may be exercised to its furthest limits notwithstanding the incidental effect on matters reserved to the States.

There is, however, in addition to that political control to which Chief Justice Marshall referred as the sole resort of the people when great powers are used unwisely[47] additional limitation upon the exercise by Congress of its power over interstate commerce. This is contained in the Fifth Amendment's guarantee to the individual that his life, liberty and property may not be denied without due process of law. The effect of this limitation has been reserved for separate consideration because it involves not the respective jurisdictions of nation and State over commerce, but the totally different question as to the extent of the individual's right to say to the federal government,—you cannot exercise even the powers expressly delegated to you in such manner as to deprive me of my property or liberty without due process of law. The former raises the issue between nation and State under the commerce clause, the latter raises the issue between the nation and the individual under the commerce clause and the Fifth Amendment. The Fifth Amendment neither limits the federal power in the interest of state power over commerce nor gives to the State any right to object to the extent or the manner of the exercise by the federal government of its delegated powers.

It may be assumed that an arbitrary prohibition of interstate commerce would violate the due process requirement of the Fifth Amendment in that it would unreasonably interfere with the individual's right to seek an interstate market for the sale of his property. There are few cases involving the meaning of

[47]Gibbons *v.* Ogden (1824) 9 Wheat. 1.

the Fifth Amendment's due process clause, but the Supreme Court has said that this clause should have the same construction as the similar clause in the Fourteenth Amendment.[48] In other words "due process" in the Fifth Amendment limits the powers of the federal government in precisely the same way that "due process" in the Fourteenth Amendment limits the powers of the States, except that the court has said that this clause does not affect the federal taxing power.[49] It is now well settled that a state statute containing a reasonable regulation of personal or property right does not constitute a deprivation thereof without due process and is, therefore, constitutional. Constitutionality depends on the reasonableness of the regulation in its effect on personal or property rights.[50]

In *Chicago, B. & Q. R. R.* v. *McGuire*[51] the court said: "Liberty implies absence of arbitrary restraint, not immunity from reasonable regulations and prohibitions imposed in the interests of the community."

A police regulation will not be held to be unreasonable and therefore unconstitutional unless it is arbitrary and oppressive interference with personal or property rights without that justification which arises from existing conditions detrimental to the public health, safety, morals or welfare, to the betterment of which it bears some substantial relation. If this be the test which determines the constitutionality of an exercise of the State's police

[48]Slaughter House Cases (1872) 16 Wall. 26, 80; Tonawanda *v.* Lion (1901) 181 U. S. 389, 391-392, 21 Sup. Ct. 609, 610; Twining *v.* New Jersey (1908) 211 U. S. 78, 101, 29 Sup. Ct. 14, 20.

[49]Brushaber *v.* Union Pacific R. R. (1916) 240 U. S. 1, 24, 36 Sup. Ct. 236, 244.

[50]"Due process of law within the meaning of the (Fourteenth) amendment is secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government." Giozza *v.* Tiernan (1893) 148 U. S. 657, 662, 13 Sup. Ct. 721, 724. The words "due process of law," "were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." Bank *v.* Okley (1819) 4 Wheat. 235, 244; Twining *v.* New Jersey (1908) 211 U. S. 78, 101, 29 Sup. Ct. 14, 20.

"The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen." Dent *v.* West Virginia (1889) 129 U. S. 114, 124, 9 Sup. Ct. 231, 234. See also to the same effect Yick Wo *v.* Hopkins (1886) 118 U. S. 356, 367, 6 Sup. Ct. 1064, 1069; Leeper *v.* Texas (1891) 139 U. S. 462 and 468, 11 Sup. Ct. 577, 579; Yesler *v.* Commissioners (1892) 146 U. S. 644, 655, 13 Sup. Ct. 190, 193-194; Duncan *v.* Missouri (1894) 152 U. S. 377, 382, 14 Sup. Ct. 570, 571-572.

[51](1911) 219 U. S. 549, 567, 31 Sup. Ct. 259, 262; McLean *v.* Arkansas (1909) 211 U. S. 539, 29 Sup. Ct. 206; Jacobson *v.* Massachusetts (1905) 197 U. S. 11, 31, 25 Sup. Ct. 358, 363.

power to legislate for the common good, notwithstanding the guarantee of due process contained in the Fourteenth Amendment, we may confidently assert that a test not less favorable to its constitutionality will be applied to a Congressional exercise of the commerce power in the interest of the common good notwithstanding the due procees clause of the Fifth Amendment. In other words, the test to be applied to determine what is due process under the Fifth Amendment is no more strict than that applied to the determination of the same question when it arises under the Fourteenth Amendment. The police power of the State is a general inherent power of the sovereign government without expression in the state Constitution. The power of Congress to regulate interstate commerce in the interest of the public welfare, if a police power at all, is part of the express power delegated by the Constitution to Congress. In the determination of the effect of the due process clause on the exercise of this power to legislate for the public good, it is not to be expected that the courts will confine the power of Congress, which is express within more narrow litmits than the power of the States, which is general and implied.

In *Adair* v. *United States*[52] the Supreme Court held unconstitutional an act of Congress prohibiting certain corporations engaged in interstate commerce from discriminating against members of trade unions in the employment or discharge of men. The basis of this decision was that the Act constituted a deprivation of the liberty of contract without due process of law. The court discussed in great detail the limitations upon Congressional control over interstate commerce imposed by the Fifth Amendment and concluded that the regulation in this Act violated the due process clause. That this conclusion is justified and proper is declared by the same court in *Coppage* v. *Kansas*[53] where a similar statute of the State of Kansas was held to be a deprivation of the liberty to contract without due process of law. It is significant that in this case the court said:[54] "The decision in the *Adair Case* is in accord with the almost unbroken current of authorities in the state courts. . . . It is not too much to say that such laws have by common consent been treated as unconstitutional."[55] Thus the court indicates that deci-

[52](1907) 208 U. S. 161, 28 Sup. Ct. 277.

[53](1914) 236 U. S. 1, 35 Sup. Ct. 240.

[54]236 U. S. at p. 21, 35 Sup. Ct. at p. 246.

[55]For decisions of state courts holding similar statutes not within the scope of state police power see note in 52 Lawyers United States Supreme Court Report 436.

sions as to the reasonableness of a regulation under the Fourteenth Amendment will at least have a bearing on the question of reasonableness when presented by a federal regulation challenged under the Fifth Amendment.

Admitting the force of the precedents in support of Congressional prohibitions of interstate commerce the opponents of some of the pending proposals for such prohibitions point out that in every previous instance the prohibition of transportation has had for its purpose the protection of the consumer rather than the producer; in other words has sought to protect the community to which the objectionable person or article might be carried in interstate commerce rather than the community from which such article or person might be carried. The fact that much of our previous legislation under the commerce clause has been confined to regulations in the interest of protecting the consumer is merely accidental. The prohibition of shipment of game killed contrary to state laws is an interesting exception. Indeed, the principal purpose of the Mann White Slave Act was to protect persons in the community from which an interstate journey began against that enslavement which might result from the interstate transportation. Reasonableness of such regulations depends on the benefit conferred not on individuals but on the general public. Prohibition of transportation of lottery tickets was upheld by the Supreme Court not on the ground of the benefit done to the individuals who might have been injured by the purchase of such tickets, but rather on the ground that the public welfare was protected to the extent that those individuals were protected against the temptation to lottery gambling. Such regulations would not be held reasonable and therefore permissible despite the due process clause, merely because a large number of individuals were thereby protected from some harmful consquence if it were not also true that the harm to them involved consequent detriment to the public welfare. It is the public welfare, not the welfare of the consumer or the producer which justifies the legislation. The real justification for such legislation as that upheld in the lottery and white slave cases is the establishment by Congress of standards of public health, morals or welfare and the maintenance of those standards by prohibiting interstate commerce which contributes to their violation.

Therefore, Congress in the exercise of the power to regulate interstate commerce may either regulate or prohibit that commerce not arbitrarily or unreasonably, but nevertheless freely

and effectively when conditions detrimental to the public welfare reasonably call for some regulation. The Congressional action in such case will be set aside as unconstitutional only when clearly unreasonable and arbitrary. As the Supreme Court has said with reference to the exercise of the state's police power:[58]

"The mere fact that a court may differ from the legislature in its views of public policy or that judges may hold views inconsistent with the propriety of the legislation in question, affords no ground for judicial interference unless the act in question is unmistakably and palpably in excess of legislative power."

The effect of the Fifth Amendment on the congressional commerce power is simply to authorize the individual to assert his constitutional guarantee of due process, to restrain the enforcement of regulations of interstate commerce which are wholly arbitrary and unreasonable. It does not affect the validity of reasonable regulations substantially related to the betterment of evil conditions existing in the nation. It is impossible to lay down in advance any fixed rules which will enable us in all future cases to separate the reasonable from the unreasonable regulation. Every regulation must stand or fall on its relation to the common welfare under all the circumstances existing at the time of its enactment. To him who asks for the application of this general argument to hypothetical cases, as for example whether Congress could prohibit the passage of sound wheat from Minnesota to Wisconsin, we can only reply in the words of Mr. Justice Harlan in the Lottery Case:

"It will be time enough to consider the constitutionality of such legislation when we must do so."

Its constitutionality will depend upon its reasonableness and its reasonableness will depend on the existence or non-existence of conditions which justify this interference by Congress with the individual's right to find for his product a market in interstate commerce.

If it be feared that the recognition of this power in the federal government will result in dwarfing the importance of the individual States it must be remembered that much of the growth in size and cost of the state governments in recent years has been due to an attempt to accomplish in a haphazard way what the

[58]Chicago, B. & Q. R. R. *v.* McGuire (1911) 219 U. S. 549, 569, 31 Sup. Ct. 259, 263.

federal government may be able to accomplish thoroughly and with considerably less expenditure of effort and money.

Moreover, it is not to be assumed that the congressman elected every two years from small districts within the States will conspire to devise ways and means of extending the federal power and crippling the influence of the States. Given its fullest scope and effect there is no real danger in holding that Congress has the power, so far as the States are concerned, to prohibit commerce among the States. That prohibition must, under the Fifth Amendment, bear some reasonable relation to the public welfare. It must not be arbitrary, confiscatory or unreasonable. This limitation in the interest of protecting the individual's rights is sufficient constitutional guarantee against any dangerous use of the power.

It would be hard to improve on Mr. Justice Marshall's statement in *Gibbons* v. *Ogden*:[57]

"If as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations and among the several States is vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people and the influence which their constituents possess at elections are in this as in many other instances, as that for example of declaring war, the sole restraints on which they have relied to secure them from its abuse."

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[57] 9 Wheat. at p. 197.